United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 19,883

FILED SEP 2 1966

Nathan J. Paulson
CLERK

ALGIE T. STEVENS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

Cr. No. 850-65

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Did the trial court abuse its discretion by failing to ascertain in advance the existence of appellant's prior convictions and to hold a hearing *sua sponte* on whether they should be excluded, or by failing to declare a mistrial following impeachment, where appellant did not request a hearing or object to the impeachment?

INDEX

TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ALGIE T. STEVENS, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a four count indictment, appellant was charged with robbery (22 D.C. Code § 2901), two counts of assault with a dangerous weapon (22 D.C. Code § 502), and mayhem (22 D.C. Code § 506). One count of assault with a dangerous weapon was subsequently dismissed. Appellant was tried by a jury on the three remaining counts and found guilty as charged on October 11, 1965. Thereafter, he was sentenced to prison for two to six years on each count, two sentences to run concurrently and one consecutively. The District Court authorized this appeal without prepayment of costs.

The Government's evidence at trial consisted primarily of the testimony of the complaining witness, John O. Green. Being deaf, unable to read, and blind in one eye, Green had his daughter-in-law interpret for him (Tr. 4). Despite initial difficulty, his testimony taken as a whole was coherent and clear. The Government also called Green's landlady and the police officer who arrested the appellant following his identification by Green in a park three and a half months after the commission of the crime (Tr. 13, 44-45).

The Government's evidence showed a vicious assault upon Green, as a result of which he lost his eye to a hatchet blow (Tr. 10, 13, 48). Green testfied that he had met Algie T. Stevens, known to him as "Al", on the street on the day of the offense (Tr. 7, 15, 19). He said he had known Stevens "a long time", about a year, from their acquaintance at a lunchroom where they both ate (Tr. 7, 14). They had had some financial dealings with each other which consisted of their lending or borrowing a dollar here and there, and on a previous occasion Stevens had come to Green's room and observed him remove money from his trunk (Tr. 7-8, 15). On the day of the offense, Green had attempted to forestall any more borrowing by Stevens and to get back a dollar owed him by asking Stevens to lend him a dollar (Tr. 8). Shortly before the offense they had shared a half pint of whiskey on the street with a third man (Tr. 20).

Thereafter, in the evening of February 12, 1965, Green went home. As he was unlocking the door, he noticed Stevens there behind him (Tr. 9.) Green told Stevens that the landlady did not permit strangers in the house after dark and attempted to close the door but Stevens pushed inside the building (Tr. 9). Apparently, there was a tussle at that time (Tr. 27-28). Green then went upstairs to his room. Several times he went to the head of the stairs and observed that Stevens was still downstairs talking to the landlady. (Tr. 9.) Eventually Green fell asleep in his room. He woke up with a hatchet blow in the eye delivered by

Stevens. Twice again Stevens hit him with the hatchet in the back of the head. (Tr. 10.) Drawing back the hatchet, Stevens ordered him to unlock his trunk, but Green managed to shove Stevens out the door of his room and lock it (Tr. 10-11). He discovered his money had been taken from his pocket (Tr. 11). Green stayed in his room that night, but saw Stevens still downstairs when he came out to wash himself the next morning (Tr. 11-12). Green did not see Stevens again until he identified him to a U.S. Park Police officer on May 31, 1965, after noticing Stevens in Franklin Park (Tr. 13, 44-45).

Green's testimony was corroborated in most respects by that of his landlady Estelle Peterbark, who, however, was able to identify Stevens by name only and not by face (Tr. 25, 33, 40-41). The identification by name was brought out following an announcement of surprise by the Government counsel and the refreshing of the witness' recollection through use of a statement given by her to the grand jury (Tr. 31-34, 41). Mrs. Peterbark, although she apparently spent several hours in the presence of the perpetrator of the crime, was not able to recognize the appellant as the perpetrator (Tr. 29). Her testimony was inconsistent as to whether she knew the appellant was not the perpetrator or did not know whether he was or was not. In this regard, she said:

> "If I see him, I don't know. I wouldn't know the man if I see him and from January or February, from that time up to now, I wouldn't know the man if I seen him." (Tr. 40.)

But a final colloquy between the prosecutor and Mrs. Peterbark was as follows:

> "Q. What you are saying then is that you don't know whether or not this is the man or not?
> A. That's right.
> Q. You are not saying it was not this man, are you?
> A. I don't know." (Tr. 41.)

She did indicate that both men were upstairs at one time when she heard fighting, that Green's face was bloody and that there was a hatchet in the house (Tr. 28, 34, 37, 42-43).

The defense of alibi was asserted by three witnesses, in addition to appellant.[1] Two were his lady friends of some three years duration (Tr. 49, 56). The last was his landlady. The two friends, Nellie Hightower and Mary Clark, testified that they were with Stevens on the night of the offense (Tr. 49-51, 54). Their testimony and that of Stevens agreed as to the approximate time of day they met, but there were wide differences in the times the three stated that they had separated (Tr. 50-52, 54-55, 58-59, 65-66, 75-76). On cross-examination Nellie Hightower indicated she recalled the date of the offense as September 12, a date only one month in advance of the trial and seven months after the date of the offense charged (Tr. 53). Mary Clark testified, as did Stevens, that her purpose in going to Stevens' place on the night of February 12 as on every Friday night was to babysit for the children of the household (Tr. 55-56, 59, 82-83). This was in contradiction of the testimony the landlady and head of the household, Isabel Ivory (Tr. 90). After being asked repeatedly by the prosecutor, Mary Clark admitted having spoken to Stevens after he was charged (Tr. 62-63). Isabel Ivory testified last, after appellant.

Without requesting a *Luck* hearing appellant took the stand. He testified in support of his alibi that he had spent the night of February 12 with his two friends (Tr. 65-66). He denied ever having known Green and ever having seen him before the day he was arrested (Tr. 67, 85). On cross-examination, appellant's testimony was impeached by eight previous convictions, of which three were felonies. Appellant admitted each con-

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[1] Appellant at no time requested a ruling on the extent to which the prosecutor would be allowed to impeach his credibility when he took the stand. The court was simply not apprised of appellant's present assertion.

viction and gave a brief explanation of one. These were: grand larceny, 1935; larceny of merchandise, 1938; grand larceny, 1938; robbery, 1942; operating a disorderly house, 1959; petit larceny, 1960; petit larceny, 1961; maintaining gambling premises, 1963. (Tr. 68-70). At no time did defense counsel make any objection to this impeachment or request a hearing on it.

In closing argument, the prosecutor pointed out the inconsistencies of the alibi, the direct contradiction between Green and Stevens concerning whether they were known to each other, and the improbability that Green could be mistaken or deliberately falsifying his identification of the assailant (Supp. Tr. 3-5, 6-8, 9). He noted the substantial corroboration of Green's landlady, Estelle Peterbark (Supp. Tr. 5-6). He then stated:

> "[T]hen, of course, the defendant testified and has an interest in his own testimony. He is the one that is on trial here and on credibility, you can take into consideration the fact that this man was convicted of crime before. The fact that he was convicted of crime before, doesn't mean that he is guilty of this one but when you consider his credibility, and his motive to lie, consider all of that." (Supp. Tr. 9).

The defense noted no objection at trial to the Government's closing argument.

Defense counsel in closing stated in part:

> "There is only one thing that is against this defendant at all and that is that he does have some kind of record which affects his credibility but we are not trying him on his record. We are trying him on the testimony that you Ladies and Gentlemen heard in this case from the stand." (Supp. Tr. 13).

The prosecutor in rebuttal noted that defense counsel said nothing about his alibi defense, and that he apparently was not impressed by it (Supp. Tr. 16).

The court charged in part:

"You are further instructed that while the law makes a defendant in a criminal case a competent witness, yet you have the right to take into consideration his situation and interest in the result of your verdict and all the circumstances which surround him, and give to his testimony such weight as you deem it fairly entitled to.

"Now, you will recall, as counsel has said to you, that there has been introduced into this case evidence of a prior criminal record of this defendant.

"The court states to you that it is not evidence of his guilt as to the three charges which he faces in this indictment.

"The sole purpose of the introduction of a prior criminal record of a defendant in a criminal case is for use by you in passing upon the credibility of that defendant.

"To repeat, it is not evidence of guilt as to the three charges which he here faces." (Supp. Tr. 21).

The trial judge also instructed as to other factors which the jury should consider in weighing the credit to be given the testimony of any witness (Supp. Tr. 20, 21-22). In regard to whether he had anything to add to the instructions, defense counsel stated he was satisfied (Supp. Tr. 33).

STATUTES INVOLVED

Title 14, District of Columbia Code, Section 305, provides:

> A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stat-

ing the fact of the conviction and for what cause, is sufficient.

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 506, provides:

> Every person convicted of mayhem or of maliciously disfiguring another shall be imprisoned for not more than ten years.

Title 22, District of Columbida Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

The trial judge did not abuse his discretion when he failed to hold a hearing *sua sponte* on exclusion of the prior conviction evidence, used for impeachment, or to exclude it *sua sponte* during or after the impeachment. Appellant made no attempt at trial to prevent his impeachment by prior convictions and that failure alone precludes reversal. The thrust of the recent decisions on prior conviction evidence places the responsibility to raise the issue of exclusion squarely on the appellant. Even assuming it was error for the trial court to fail to hold a hearing *sua sponte* and this resulted in the admission of eight prior convictions, this was harmless. The jury was presented with a weak case by the defense, and received

full instructions on the limitations of its use of the conviction evidence. Furthermore, appellant's credibility was the central issue in the case, and the impact of the impeachment fell properly on the trustworthiness of his alibi testimony. Thus, the judgment of the jury was not substantially swayed by any prejudice in the impeachment.

ARGUMENT

The trial court was not required to hold a hearing on exclusion of prior convictions for impeachment where defense counsel failed to request a hearing or to object to their admission.

(Tr. 68-70.)

Although appellant now contends that "it became imperative that appellant take the stand in his own behalf" to establish his alibi following the testimony of his two alibi witnesses (Appellant's Br. 4), the defense counsel for reasons best known to himself failed to request a hearing on the exclusion of prior conviction evidence for impeachment before placing appellant on the stand. During cross-examination of appellant by the prosecutor as to prior convictions, no objection was made by the defense. Nevertheless, under *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), appellant now claims reversible error in the failure of the trial court to hold a hearing *sua sponte* on exclusion of the evidence or to take action to exclude it.

To a large extent *Luck* contemplates a situation where a defendant might decline to testify at all if impeachment by his criminal record is to be permitted. The Court in *Luck* expresses its concern that the cause of truth might not be served if the defendant through fear of the prejudicial effect of impeachment failed to give his story. *Luck* v. *United States*, *supra* at 156, 348 F.2d at 768, n. 7. This would appear to be a matter of special concern in an alibi case, as *Luck* was. Cf. *(Fletcher) Smith* v. *United States*, —— U.S. App. D.C. ——, 359 F.2d 243

(1966). In the present case, however, this issue was never focussed upon and appellant was not deterred from taking the stand to give his alibi. The fact that this situation was evident in advance and the defense completely failed to protect itself or preserve the point should preclude further consideration on appeal. *Walker* v. *United States*, D.C. Cir. No. 19,962, decided June 9, 1966.[2]

Yet appellant argues that the prosecutor's first question on impeachment should have operated as a red flag and caused the trial court to invoke its own discretion even without timely objection by the defense (Appellant's Br. 3, 6-7).[3] But *Luck* does not speak in terms of compulsion upon the court.

> "[T]he judge trying that cause should feel free to approach the problem, if it arises, as one to be decided according to his best judgment in the light of the record as it develops before him." *Luck* v. *United States*, *supra* at 157, 348 F.2d at 769.

Recent elaborations of the *Luck* principle firmly suggest that the defense has the burden of invoking the trial court's discretion. *Walker* v. *United States*, *supra*. *Hood* v. *United States*, D.C. Cir. No. 19,650, decided June 30, 1966.[4]

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[2] The implicit suggestion of appellant that the trial court is required to take upon itself the task of learning whether a defendant has a criminal record for impeachment in advance of his taking the stand, and if so, should raise the issue of its admissibility *sua sponte* at that time, is without precedent and merits no further discussion.

[3] Although his brief clearly poses the issue, appellant avoids facing the fact that he is really asking this Court to find the trial court in error because it did not declare a mistrial when the Government concluded its impeachment or at the end of the case. Such reasoning from hindsight merely emphasizes the obvious and necessary role of defense counsel in any criminal case.

[4] Appellant necessarily attempts to distinguish *Walker* and *Hood* from the situation at hand (Appellant's Br. 5-7, 8). In regard to *Walker*, however, the introduction of two prior convictions including one for carrying a dangerous weapon in a case where three of the four charges involved a dangerous weapon and where the contested question of ownership of the gun "occupied a central place in the

The Court in *Walker* noted the likelihood that the prior conviction evidence played a part in the jury's conclusions but, nevertheless, pointed out that the defense let pass two opportunities to prevent its introduction. *Walker* v. *United States*, *supra*, page 2 of the slip opinion. It is thus difficult to regard *Walker* as holding anything less than that even where serious prejudice may exist, the defense must invoke the trial court's discretion by timely objection or waive the point. Similarly, in *Hood* the Court in explicit language requires that the defense press home its point and its reasoning before the trial court may be held to have abused its discretion in permitting impeachment by prior conviction evidence. *Hood* v. *United States*, *supra*, at 3. And in *Hood* of course the defendant suffered the primary prejudice discerned in *Luck* by failing, through fear of prejudice, to take the stand in his own defense. Appellant cannot escape the impact of these recent cases.[5]

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jury's view of the whole case" was noted by the Court to be significant from the viewpoint of prejudice. *Walker* v. *United States*, *supra*, at page 2 of the slip opinion. Nor can the prosecutor's failure to comment upon the convictions be a distinguishing point where in the present case his comment was brief and merely reinforced the defense counsel's own comment and the trial court's instruction (Supp. Tr. 9, 13, 21).

In regard to *Hood*, appellant notes that the Court's decision rested on the lack of information given the trial judge by defense counsel as to Hood's probable testimony, the reasons for exclusion of the prior conviction, and what the prior crime was (Appellant's Br. 6). Of course, the crux of the present case is that the trial court was even less informed, the matter never having been brought to his attention at all. So much less then could his discretion have been effectively invoked or abused.

[5] It would appear that in deciding upon a waiver type principle in impeachment by prior conviction cases, the Court has rejected the analogy to *Jackson* v. *Denno*, 378 U.S. 368 (1964), in the constitutional law area. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) and *Fay* v. *Noia*, 372 U.S. 391, 439 (1963), defining waiver as "ordinarily an intentional relinquishment or abandonment of a known right or privilege."

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional

Appellant urges that the failure of the trial court to hold a hearing *sua sponte* and the consequent admission of eight prior convictions of appellant on cross-examination constitutes plain error[6] (Appellant's Br. 12-14). The short answer to this is that the *Walker* and *Hood* cases, *supra*, have determined the issue of where the initiative must rest and declined to find plain error in similar contexts. Assuming this Court now holds that a *sua sponte* hearing is necessary or that admission of eight convictions without objection constitutes error, this is nevertheless harmless error under the circumstances of this case.[7]

The Supreme Court in *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946), laid down guidelines for use by appellate courts in determining whether errors influenced a jury to an extent requiring reversal. The *Kotteakos* principles have been applied in at least two cases of the type presently before the Court. In *Campbell* v. *United States*, 85 U.S. App. D.C. 133, 176 F.2d 45 (1949), the Court affirmed a conviction of assault with intent to rape and simple assault although the trial court had erroneously permitted impeachment of the defendant by a petit larceny conviction then pending on appeal. The Court there said:

> "It the light of these guiding principles [referring to *Kotteakos*], we have carefully read the transcript of the evidence in an attempt to determine what effect the erroneous admission of the evidence of Campbell's conviction for petit larceny may have had upon the judgment of the jurors. We are fully persuaded that it had very slight, if any, effect." 85 U.S. App. D.C. at 136, 176 F.2d at 48.

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rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson* v. *Zerbst*, *supra*, at 464.

But in the law of evidence failure to object is a known relinquishment of a right. Indeed, our case does not rest merely on the principles of evidence, but on the basic principle that discretion not invoked cannot be abused.

[6] F.R. Crim. P. 52(b).

[7] F.R. Crim. P. 52(a).

In *Joseph* v. *United States*, D.C. Cir. No. 19,741, affirmed April 5, 1966, without opinion, this Court had before it a case in which a defendant convicted of robbery had been impeached by evidence of convictions for carrying a deadly weapon and attempted petit larceny.

In the present case, the jury had before it, in addition to appellant's admission of the prior convictions, his incredible testimony that he had never seen the complainant before (Tr. 67, 85), and the virtual collapse of his alibi under cross-examination of the alibi witnesses (Counterstatement, *supra* at p. 4). Moreover, the prosecutor and defense counsel in closing argument admonished the jury to limit their use of the prior conviction evidence (Supp. Tr. 9, 13). The trial judge specifically charged the jury that the admission of prior convictions was to be used by them solely in passing upon the credibility of the appellant (Supp. Tr. 21). The jury were also instructed that they could consider the witness' situation and interest in the outcome of the trial, whether he testified falsely and knowingly as to a material fact about which he could not be mistaken, his demeanor and apparent candor and fairness or lack of it (Supp. Tr. 20-22). See also *Joseph* v. *United States*, *supra*.

Furthermore, appellant's claim that prejudice resulting from the absence of a hearing and the admission of the conviction evidence substantially affected his rights fails when analyzed in terms of the central issue in the case.[8]

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[8] Appellant urges this Court to accept the "standard" of *Awkard* v. *United States*, —— U.S. App. D.C. ——, 352 F.2d 641 (1965), and *Michelson* v. *United States*, 335 U.S. 469 (1948) (Appellant's Br. 9-10). Their principles are clearly applicable to the matter of the impeachment of character witnesses, but not here. *Awkard* involves the use of two of the defendant's arrests and her forfeiture of collateral for disorderly conduct to impeach the character witnesses, neither of which of course could be used to impeach the defendant's own testimony. The Court noted that in view of the period of acquaintanceship of the character witnesses with the defendant, this evidence "did not fulfill the only purpose for which such cross-examination is admitted." —— U.S. App. D.C. at ——, 352 F. 2d at 646. It thus had no saving relevance whatever. In *Michelson*, the Supreme Court affirmed a conviction of bribery of a federal

That issue was the validity of the alibi defense, a matter largely dependent, as appellant admits, on the credibility of the appellant's testimony (Appellant's Br. 4).[9] It is therefore difficult to avoid the conclusion that any "substantial effect" of the evidence as to prior convictions was an impeaching effect legitimately bearing on the central question of appellant's credibility.[10] This, it would appear, is what the Court had in mind when it declined to find reversible error in the impeachment of Luck's alibi testimony. *Luck* v. *United States*, *supra* at 157, 348 F.2d at 769. Considering the absence of precedent for any re-

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revenue agent where a character witness had been impeached in regard to the defendant's arrest twenty-seven years before. While criticizing the rule and practice, the Court nevertheless explicitly declined to overrule it. It noted that:

> "[I]n cases such as the one before us, the law foreclosed this whole confounding line of inquiry, unless defendant thought the net advantage from opening it up would be with him. Given this option, we think defendants in general and this defendant in particular have no valid complaint at the latitude which existing law allows to the prosecution to meet by cross examination an issue voluntarily tendered by the defense." 335 U.S. at 485.

[9] As in most alibi cases, no other defense on the merits was offered.

[10] Appellant argues in a circle that appellant's credibility was "all-important" and thus the impeachment evidence had substantial influence on the outcome of the trial (Appellant's Br. 13). But clearly, if this so, this is a legitimate effect. *Cf. Awkard* v. *United States*, *supra*. This Court said in *Richards* v. *United States*, 89 U.S. App. D.C. 354, 357, 192 F.2d 602, 605, *cert. denied*, 342 U.S. 946 (1951):

> "[W]hen the jury comes to assess the truth of any man's testimony it should be allowed to consider his previous criminal activity and its impact on his trustworthiness."

Although some recent commentary has regarded prior conviction evidence as of small relevance to impeachment, it is submitted that the rule permitting such evidence in this jurisdiction is clear. The rationale is well stated in *Clawans v. District of Columbia*, 61 App. D.C. 298, 299, 62 F.2d 383, 384 (1932), *aff'd*, 200 U.S. 617 (1937):

> "But the basis of the admissibility of convictions always was and always should be grounded upon the theory that the depraved character of persons who commit crimes involving moral corruption makes them unworthy of trust in testifying."

quirement of *sua sponte* action by the trial court and the appropriateness of the impeachment of appellant on cross-examination, the Government urges this Court to find no error, or, in the alternative, to find that the jury's "judgment was not substantially swayed by the error" and that it therefore did not constitute reversible error.[11]

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[11] Appellant has adopted a scattergun approach to the issue of prejudice resulting from use of the present convictions for impeachment which in addition asserts that two of the convictions should not be considered crimes (Appellant's Br. 10-12), some of the convictions are too old (Appellant's Br. 6), and one is too similar to the crimes at hand (Appellant's Br. 10). The Government urges that, even if found to be errors and cumulated under *Luck* v. *United States*, *supra*, 121 U.S. App. D.C. at 157, 348 F.2d at 769, this impeachment did not substantially influence the outcome of the trial. Taken individually, each of these issues has been resolved by this Court. *Pinkney* v. *United States*, D.C. Cir. No. 19,925, decided July 8, 1966, at page 5 of the slip opinion, has drawn the line at a point which clearly finds operating a disorderly house and maintaining gambling premises to be "crimes" under 14 D.C. Code § 305. A *malum in se* doctrine which appellant seeks to extract from subsequently repudiated language, *Bostic* v. *United States*, 68 App. D.C. 167, 168, 94 F.2d 636, 637 (1937), *cert. denied*, 303 U.S. 635 (1938), in *Clawans* v. *District of Columbia*, *supra*, 61 App. D.C. at 299, 62 F.2d at 384, has been ruled upon by this Court, implicitly to be sure, in *Walker* v. *United States*, *supra*, where use of a conviction under the licensing statute for carrying a dangerous weapon was affirmed. *Murray* v. *United States*, 53 App. D.C. 119, 288 Fed. 1008, *cert. denied*, 262 U.S. 757 (1923), where a defendant on trial for manslaughter in 1922 had been impeached with five misdemeanors including one in 1908, two in 1909, and two in 1911, held remoteness to affect weight but not admissibility. In *Richards* v. *United States*, 89 U.S. App. D.C. 354, 192 F.2d 602 (1951), the Court held admissible a conviction eight years old. Finally, in *Hall* v. *United States*, 84 U.S. App. D.C. 209, 211, 171 F.2d 347, 349 (1948), where a defendant charged with carnal knowledge was impeached with a prior carnal knowledge conviction and sentenced to death, the Court said "the fact that it was similar to the one for which he was then on trial could not affect admissibility at all."

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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BRIEF FOR APPELLANT

653

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 29 1966

Nathan J. Paulson
CLERK

No. 19,883

ALGIE T. STEVENS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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July , 1966

I N D E X

QUESTION PRESENTED

Whether the trial court erred in failing to hold, on its own motion, a hearing to exclude the use of prior convictions to impeach the credibility of the appellant.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

Continued

* Cases principally relied on.

STATUTES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,883

ALGIE T. STEVENS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Algie T. Stevens, was tried and convicted October 11, 1965 in the United States District Court for the District of Columbia of Robbery, Mayhem, and Assault With A Dangerous Weapon. On November 5, 1965, Judgment of conviction was entered and appellant was given sentences of two to six years on each count, two sentences to run consecutively and the third concurrently with the first. An affidavit in support of application to proceed on appeal without prepayment of costs was duly filed in accordance with Rule 37, Fed.R.Cr.P. and was allowed by the trial court. Jurisdiction to decide this appeal is vested in this Court by virtue of 28 U.S.C. § 1291 and 1294.

STATEMENT OF THE CASE

Three prosecution witnesses, including the complainant, and four defense witnesses, including the defendant, were called to testify in this case. The testimony on either side was conflicting, and at one point, government counsel announced surprise during the testimony of its corroborating witness, Mrs. Estelle Peterbark (Tr. 31). During cross-examination, the defendant was questioned as to eight prior convictions for purposes of impeachment. These ranged in age and seriousness from grand larceny in 1935 to maintaining gambling premises in 1963 (Tr. 68-70). No hearing for purposes of excluding the prior convictions was requested by defense counsel, and none was held. On closing argument government counsel commented upon the prior convictions as affecting credibility (Supp. Tr. 9).

SUMMARY OF ARGUMENT

In cases where the defense is alibi and where the testimony of other witnesses creates a close issue for the jury, the defendant must be accorded the opportunity to give, unimpeached by evidence of prior convictions, his version of events. Although no hearing on the matter was requested, the lits of prior convictions was of such length and quality to raise a serious question of prejudice in allowing their admission. Abuse of discretion by the trial judge was not necessarily in failing to exclude all eight of the prior convictions, rather in ignoring the red flag and subjecting the defendant to such cross-examination without, sua sponte, calling counsel to the bench. The ages of the larceny convictions (1935 and 1938) and the irrelevant nature of the offenses of maintaining gambling premises and operating a disorderly house invite misuse and misunderstanding. A case of plain error under Federal Rules of Criminal Procedure Rule 52(b) is made out and, having substantially prejudiced appellant's right to a fair trial, requires reversal of his conviction and a new trial.

ARGUMENT

Following testimony by government witnesses and two defense alibi witnesses, appellant took the stand in his own behalf to establish his whereabouts at the time of the alleged crimes. The complainant, John O. Green, required the assistance of an "interpreter", his daughter, because of his physical inability to communicate (Tr. 4). Estelle Peterbark, Mr. Green's landlady was supposed to be a corroborating identification witness, yet she stated unequivocally that appellant was not the same man (Tr. 30). After government counsel announced surprise, he elicited only that she knew the assailant's name was Stevens (Tr. 33), that she got the name "from Green" (Tr. 33) and "... another man told [her] on Sunday what his name was" (Tr. 34). On redirect, it was established that Mrs. Peterbark wasn't sure who it was at the scene (Tr. 41).

Nellie Hightower and Mary Clark were called as defense witnesses and their statements were inconsistent to some extent. In the face of all this, it became imperative that appellant take the stand in his own behalf, because there is little value to an alibi if the jury cannot hear from the accused that he was not at the scene of the crime.

Section 305 of Chapter 14 of the D. C. Code provides that prior convictions of crime "may" be given in evidence

"to affect the credibility of a witness..." (emphasis added). This language is not mandatory and leaves the question of impeachment by use of prior convictions to the "sound judicial discretion" of the trial judge. Luck v. United States, 121 U.S. App. D.C. 151 (1965)

Luck should be considered the harbinger of the limited use of convictions of crime to attack the credibility of a witness, not the final word. The flexibility of the trial judge in that case was characterized thus:

> "... in the event that a new trial results from the remand we have concluded to make, the judge trying that cause should feel free to approach the problem... as one to be decided according to his best judgment in the light of the record as it develops before him." Luck v. U.S., supra at 157

This does not seem to limit the judge's discretion to the specific instance of defense counsel's requesting a ruling on admissibility. The recent decisions in Hood v. United States, U.S. Ct. of Appeals for the D.C. Circuit #19,650, decided June 30, 1966 and Walker v. U. S., U.S. Ct. App. D.C. Cir. #19,962, dec. June 9, 1966 indicate this court's unwillingness to find abuse of discretion where defense counsel does not request a ruling and set forth his grounds. It is urged that the admonitions and criteria of Luck are much more applicable in this case than in either Hood or Walker; therefore, they are distinguishable. The pertinent criteria are

"the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and above all, the extent to which it is more important to the search for truth... for the jury to hear the defendant's story than to know of a prior conviction." Luck v. U. S., supra at 157.

To this may be also added the age of the convictions. cf. Michelson v. U. S., 335 U.S. 469 (1948)

The decision in Hood, where a hearing was actually requested, rested on the fact that the trial judge was not informed of Hood's probable testimony, or why it was desirable to exclude the prior conviction or even the nature of the prior crime. Thus the conclusion that the judicial discretion had not been effectively invoked ruled out a finding of abuse. Similarly, in Walker, no objection was registered and only two prior convictions were elicited. Walker's testimony was in regard to the element of who actually owned the gun in the case, and the prosecutor did not refer to the prior convictions.

In distinguishing these cases from the instant problem, the inherently prejudicial nature of these prior convictions became apparent almost immediately. Two other alibi witnesses had testified, disclosing the obvious nature of the appellant's testimony. The first conviction in question was a thirty-year old offense of larceny. The "best judgment" of the trial

judge should have been activated immediately, even though defense counsel failed to object. This was a case where, ab initio, the prejudicial effect of impeachment far outweighed its value in attacking credibility. Unusual circumstances also heighten the importance of excluding the past acts. In Smith v. U. S., U.S. Ct. Apps. D.C. Cir. #19,629, dec. March 9, 1966, this Court found that:

> "... when inferences founded upon unexplained acts are likely to be heavily operative, the court's discretion to let the jury hear the accused's story, unaccompanied by a recital of his past misdeeds, may play an important part in the achievement of justice." Smith v. U.S., supra at 3.

However, Smith's trial preceded the Luck opinion and the matter was not raised before the trial judge.

Luck was nearly five months old when appellant was tried, and there were special curcumstances. It became evident toward the end of the trial that a combination of Mr. Green's handicap, Mrs. Peterbark's indecisiveness and the conflicting defense testimony made it imperative that the defendant testify.

If the judge erred in not holding, on his own motion a hearing on the Luck point, what prejudice occurred? A total of eight prior convictions was elicited: three larcenies in 1935 and 1938; a robbery in 1942; two petty larcenies in 1960

and 1961; operating a disorderly house in 1959; and maintaining gambling premises in 1963. In aggregate, this made the appellant out to be a habitual criminal, attacking his character instead of his mere worthiness of belief.

In the very recent case of Pinkney v. U. S., U.S. Ct. App. D.C. Cir. #19,925, dec. July 8, 1966 and quoting Richards v. U. S., 89 U.S. App. D.C. 354 (1951), this court affirmed:

> "... evidence of prior convictions must be received with caution for such evidence 'not only permits the prosecutor to throw doubt upon the defendant's testimony regarding the facts of the case being tried, but may also result in casting such an atmosphere of aspersion and dispute about the defendant as to convince the jury that he is a habitual lawbreaker who should be punished and confined for the general good of the community'." Pinckney v. U. S., supra at 3.

To reinforce this effect, the prosecutor in the instant case, unlike that in Hood v. U. S., supra, made the following comment to the jury:

> "... the defendant testified and has an interest in his own testimony. He is the one that is on trial here and on credibility, you can take into consideration the fact that this man was convicted of crime before. The fact that he was convicted of crime before, doesn't mean that he is guilty of this one but when you consider his credibility, and his motive to lie, consider all of that." (Supp. Tr. 9)

The trial judge gave the usual restrictive instruction on use of prior convictions (Supp. Tr. 21).

Notwithstanding its apparent propriety the element of impeachment was highlighted and the explanatory instruction probably did little, if anything, to dispel from the minds of the jurors the bare fact of eight prior convictions, regardless of their relevancy to the trait of trustworthiness. It is firmly recognized that juries are not so objective and detached that they limit the evidence to a specific purpose. The earlier convictions could not be blocked out when the jury considered guilt as opposed to credibility. See Pinckney v. U. S., supra; Awkard v. U. S., 122 U.S. App. D.C. ___ 352 F.2d 641 (1965); Michelson v. U. S., supra; cf. Jackson v. Denno, 378 U.S. 368 (1964).

Although Awkard and Michelson involve the use of prior criminal acts to test the reliability of character witnesses, the principles of fairness and discretion are the same. The language in both opinions resembles that of Luck v. U. S., supra, regarding the importance and broad responsibility of the trial judge's discretion. Therefore, the additional factor of the adverse influence upon the jury, unaffected by the limiting instructions increases the burden upon the trial judge to exercise his discretion, at least to the extent of questioning the use of impeachment matter.

As to the reasons for excluding each conviction, if a hearing were held, a brief discussion should suffice, since the

primary challenge is to the failure to hold a hearing. The nature of each, however, affects the balance between prejudice and probative value, going to the conclusion of reversible error in this case.

Convictions of larceny dating to the appellant's early 20's in 1935 and 1938 could have little, if any bearing on his credibility in 1965. Unlike Michelson v. U. S., supra, where the reputation testimony was relevant for a 30 year period. "Intimations of past crimes, especially crimes similar to the crime charged, are extremely damaging to an accused." Awkard v. U. S., supra at 645.

In addition to its great age, 22 years, the robbery offense is a suggestion, not that appellant is not worthy of belief, rather that he has robbed before and will rob again.

Two of the recent offenses, operating a disorderly house (D.C. Code 22-2722) and maintaining gambling premises (D.C. Code 22-1505) are of such a minor nature as to be subject to attack as "crimes" within the contemplation of D.C. Code 14-305. Since that statute was construed in Murray v. United States, 53 App. D.C. 119 (1923), there has been little question that both felonies and misdemeanors are contemplated. See also Bostic v. U. S., 68 App. D.C. 167 (1937) and Sanford v. U. S., 69 App. D.C. 44 (1938). Despite this construction, this Court in Campbell v. U. S., 85 U.S. App. D.C. 133 expressed misgivings over

this broad definition of crimes, but declined to overrule prior cases on the intent of Congress. Campbell was, however, considered in light of the fact that an appeal was pending on the petty larceny conviction, the subject of the impeachment.

In two instances, the definition of "crimes" has been delimited, indicating a willingness to exclude certain minor offenses from the purview of § 305. Clawans v. D. C., 61 App. D.C. 298 (1932) held it error to use a conviction for violation of an ordinance prohibiting sale of half a round trip train ticket, punishable by a fine.

More recently, in Pinkney v. U. S., supra, it was held that vagrancy, disorderly conduct and prostitution were not "crimes" within the meaning of § 305. The controlling point was the fact that all were petty offenses and none were triable by a jury, although they were D.C. Code offenses, not municipal ordinance offenses. Although operating a disorderly house and maintaining gambling premises are punishable by one-year jail terms and triable by jury, they seem to fall outside the class of offenses contemplated in Clawans:

> "But the basis of the admissibility of convictions always should be that the depraved character of persons who commit crimes involving moral corruption makes them unworthy of trust in testifying. This theory, however, has little or no basis

> in the violation of municipal ordinances, or for that matter misdemeanors involving no element of inherent wickedness." Clawans v. D. C., supra at 299.

It is but a short step, taken in concern that justice be accomplished and prejudice be avoided, to include these two petty offenses, not mala in se, within the exclusion of Clawans and Pinkney.

In order to grant the relief requested, this court must find within the terms of Federal Rules of Criminal Procedure Rule 52(b) that this is plain error "affecting" substantial rights." The aggregate of prejudice created by admitting the evidence of eight prior convictions is sufficient to warrant a finding of reversible error in such a close case as this. It may be argued that since there was no request for a ruling, discretion was not invoked and therefore could not have been abused. Hood v. U. S., supra; Walker v. U. S., supra. This is, if anything, a failure of the trial judge to correct a patently prejudicial situation and a mistake on the part of defense counsel in not raising the issue.

Each case wherein plain error is claimed must stand upon its own merits and a judicial flexibility be employed to find that the effect of the claimed prejudice substantially swayed the jury. Kotteakos v. U. S., 328 U.S. 750 (1946).

> "... if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Kotteakos v. U.S., supra, at 764, 765.

In the present case, there is little question that the inconsistency and relative inconclusiveness of the testimony of other witnesses devolved upon the appellant the responsibility for establishing his own defense. As it was, the credibility of appellant was all-important and the balance upon which conviction or acquittal hung. The error of allowing evidence of prior convictions thus had substantial influence upon the outcome of the trial.

In Campbell v. U. S., supra, the affirmance of convictions of assault with intent to commit rape and simple assault was based upon the inconsequentiality of the erroneous admission of the prior conviction. In finding harmless error, the court stated it was very unlikely that the jury gave much weight to "appellant's admission of having been convicted of stealing a bottle of perfume." Campbell v. U. S., supra at 136. Yet here are

involved eight prior acts, some of which were felonies, including a robbery. Appellant's jury had the benefit of no explanation of the state of an appeal, including newly discovered exculpatory evidence as in the case of Campbell. In the context,-- then, of Campbell v. U. S., this is plain error.

Plain error is usually a combination of the act or omission of trial judge or prosecutor and the failure of defense counsel to object. Robertson v. U. S., 84 U.S. App. D.C. 185(1948), a capital case, involved the failure of defense counsel to object to the admission of highly prejudicial incompetent evidence and an incorrect comment on the evidence by the trial judge. Finding plain error, the court held:

> "A lawyer cannot fail in this important duty to the court and his client without danger of serious effect upon the due administration of justice, in which his responsibility is quite equal to that of the court...
>
> "... That the natural and probable influence upon the jury was prejudicial, and that the right of appellant to a fair and impartial verdict of the jury was substantially affected." Robertson v. U. S., supra at p. 186.

Other cases involving counsel's failure to lodge timely objections in which reversals were obtained under Rule 52(b) are Goforth v. U. S., 106 U.S. App. D.C. 111(1959); Payton v. U.S., 96 U.S. App. D.C. 91 (1955) and Tatum v. U. S., 88 U.S. App. D.C. 386 (1951).

Failure of counsel to request and the judge to conduct, sua sponte, an admissibility hearing should not operate to deprive appellant of a "fair and impartial verdict."

CONCLUSION

Retrospectively, as errors must be viewed on appeal, the admission into evidence of eight prior convictions affected appellant's substantial rights to the point of depriving him of a fair jury verdict. At the very least, upon development of the record before him, the trial judge should have inquired into the extent of the prosecution's use of impeachment material. The discretion of the trial judge in this case should not be so inflexible as to rely upon the request of counsel for its application, and thus deprived appellant of its benefit.

WHEREFORE, the appellant respectfully prays for reversal of his conviction and remand of the case for a new trial.

Respectfully submitted,

Robert A. Metry

ROBERT A. METRY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been served personally at the Office of the United States Attorney, United States District Courthouse, Washington, D. C. this 29th day of July, 1966.

Robert A. Metry

ROBERT A. METRY

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,883

ALGIE T. STEVENS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING EN BANC

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 8 1966

Nathan J. Paulson
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PETITION FOR REHEARING EN BANC

Petitioner, appearing pro se, hereby petitions the Court for a rehearing of its opinion in this case, decided October 20, 1966. Petitioner further requests that this rehearing be considered by the entire Court sitting en banc.

As grounds for this petition, appellant-petitioner states as follows:

1. On October 11, 1965, he was tried by a jury and convicted of robbery (D.C. Code 22-2901), assault with a dangerous weapon (D.C. Code 22-502 and mayhem (D.C. Code 22-506).

2. At trial, petitioner testified in support of his alibi defense, and on cross-examination, without objection by his counsel or restraint by the trial court, the prosecution elicited from petitioner that he had been convicted of the following offenses:

> Grand larceny, in February, 1935
> Larceny, in August, 1938
> Grand larceny, in December, 1938
> Robbery, in November, 1942
> Operating a disorderly house, in October, 1959
> Petit larceny, in March, 1960
> Petit larceny, in January, 1961
> Maintaining a gambling premises, in February, 1963

3. The trial occurred almost five months after the decision in Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), where this Court emphasized that the trial judge has available much discretion in permitting evidence of prior convictions to be introudced on the issue of credibility under the D.C. Code 14-305. (Supp. V 1966). This Court said:

> Section 305 is not written in mandatory terms. It says, in effect, that the conviction "may" as opposed to "shall" be admitted; and we think the choice of words in this instance is significant. The trial court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute (Section 305), in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case.

> There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field. In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction.

4. No discretion was exercised at all by the trial judge in this regard at petitioner's trial; neither the trial judge nor defense counsel interfered at any time during that portion of petitioner's cross-examination dealing with petitioner's prior convictions.

5. This failure on the part of the trial judge affected petitioner's trial. The prejudice resulting from the evidence of numerous prior convictions greatly outweighed its probative relevance to petitioner's credibility. Even assuming that all of the prior convictions were relevant to his credibility in 1965, the effect of those convictions must

of necessity have carried over to the issue of guilt at the 1965 trial. As Judge Fahy stated in his dissent in the affirmance of petitioner's conviction, "A jury cannot be expected to departmentalize such evidence."

6. Despite the failure of counsel to object to the introduction of such evidence or to seek some limitation upon this type of evidence, under Rule 52(b), Federal Rules of Criminal Procedure, this Court is not prevented from finding "plain error affecting substantial rights" in the failure of the trial court to apply the Luck decision and to exercise discretion in deciding which of the prior convictions should have been excluded.

7. On appeal before Wilbur K. Miller, Senior Circuit Judge, and Circuit Judges Fahy and Tamm, the record was affirmed by a divided court, Judge Fahy dissenting. The question in issue therefore remains in dispute. The entire Court has not considered the facts of this case in view of the Luck decision and a rehearing en banc would clarify the law with regard to the trial judge's discretion in allowing evidence of past convictions to be used for impeachment purposes.

8. This petition is presented in good faith belief that, in order to mitigate the danger of prejudice, the

trial court in this case should have exercised the discretion referred to in the Luck decision.

THEREFORE, petitioner respectfully requests this Court to grant him a rehearing en banc.

Respectfully submitted,

ALGIE T. STEVENS (Pro se)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition was mailed, postage prepaid, to the United States Attorney, United States Courthouse, Washington, D. C. this day of November, 1966.

ALGIE T. STEVENS